

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN RATLIFF)	
Claimant)	
VS.)	
)	Docket No. 179,931
WICHITA COCA-COLA BOTTLING COMPANY)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

ON the 7th day of December, 1993, the application of respondent for review of an October 26, 1993 Order entered by Administrative Law Judge John D. Clark, came on for oral argument before the Appeals Board by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, James B. Zongker, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Lyndon W. Vix, of Wichita, Kansas. There were no other appearances.

ISSUES

- (1) Does the Appeals Board have jurisdiction to hear this appeal?
- (2) Has claimant met his burden of showing he made a timely written claim?

RECORD

The record before the Appeals Board consists of all pleading of record and the transcript of the October 26, 1993 hearing, including medical records marked as Claimant's Exhibit No. 1 and Respondent's Exhibit No. 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) The Appeals Board does have jurisdiction pursuant to Sections 49 and 53 of the 1993 Session Laws of Kansas, Chapter 289.

Respondent appeals a preliminary order for payment of medical expenses. Respondent contends that claimant did not make a timely written claim as required by K.S.A. 44-520a. The appeal is, therefore, an appeal from a finding on a jurisdictional fact. As specified in Section 49 and Section 53 of the 1993 Session Laws of Kansas, Chapter 289, the Appeals Board does have jurisdiction to hear the appeal.

(2) Claimant has not met his burden of establishing that he made a timely written claim.

Claimant alleges he was injured in August, 1992, and each work day thereafter through June 29, 1993. At the preliminary hearing the Administrative Law Judge heard statements of counsel and received into evidence certain medical records. No testimony was taken.

The statements of counsel indicate claimant injured his neck in August, 1992, when the forklift he was driving fell about six feet off a loading dock. He was treated at the emergency room and returned to work. He thereafter continued to work through June, 1993, and according to claimant's counsel the condition worsened. Claimant did not testify but at oral argument before this Appeals Board, respondent's attorney stipulated that claimant would have testified that the condition became progressively worse. Respondent's counsel stated, without contradiction by claimant's attorney, that the employer had filed a report of accident within 28 days. Claimant would, therefore, have 200 days to serve his written claim.

Medical records were offered and admitted. They include records of May 5, 1993, which refer to problems with a slipped disc in his neck since April 15, 1993. As to the cause of the neck injury, the records of June 29, 1993, describes the accident of August, 1992, and state:

Since then he has had difficulty in progressive degrees with arm pain, arm numbness and neck pain....The question is whether there is a cause and effect relationship between the work accident and the neck injury. I told him it was certainly within the realm of medical probability that an injury could have been encountered in mid-August and did not start to show up as any symptoms of radiculopathy until approximately six months later.

The claimant has the burden of proving the various conditions upon which the right to benefits depends. K.S.A. 44-501. Where the respondent has denied that a timely written claim was made, claimant must show either that such a claim was made within 200 days or that no report of accident was filed within 28 days and that written claim was served within one year as required by K.S.A. 44-520a. Claimant has not met that burden here.

Claimant contends that the injury of August, 1992, was thereafter aggravated by work activities through June of 1993. If claimant were to establish that permanent aggravation resulted from work, the written claim would be timely. However, the evidence establishes only that claimant had "... difficulty in progressive degrees...." This evidence indicates the injury or symptoms became worse. It does not establish that claimant's work activities caused it to become worse or that permanent aggravation resulted.

In oral argument before the Appeals Board, counsel for both parties indicated that although they may not have expressly consented to submit the case on the basis of statements of counsel and the medical records, they certainly did acquiesce to the procedure. Neither objected. As the law now provides for appeal of preliminary hearing decisions in a much broader range of circumstances, a complete evidentiary record is essential for the Appeals Board's consideration.

The Appeals Board finds, in this case, claimant has failed to meet his burden of establishing a timely written claim and the application for medical and temporary total benefits should be and the same is hereby denied.

WHEREFORE, claimant's application for medical and temporary total disability benefits is hereby denied and the October 26, 1993 decision of the Administrative Law Judge ordering respondent to provide medical benefits is hereby reversed.

IT IS SO ORDERED.

Dated this _____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James B. Zongker, P.O. Box 47370, Wichita, Kansas 67201-7370
Lyndon W. Vix, 125 North Market, Suite 1600, Wichita, Kansas 67202
John D. Clark, Administrative Law Judge
George Gomez, Director